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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Defendant-Petitioner,
v.
SANDRA WETZEL and MARI ROSS, on behalf
of themselves and all others
similarly situated,
Plaintiffs-Respondents.

Petition For A Writ Of Certiorari To The
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF WESTINGHOUSE ELECTRIC CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This brief *amicus curiae* is filed by Westinghouse Electric Corporation (hereinafter "Westinghouse") with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

1. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF WESTINGHOUSE ELECTRIC CORPORATION

Westinghouse is engaged in the manufacture of industrial electrical equipment, consumer electrical appliances, electronic equipment, electric motors, jet engines, as well as other electrical items and machinery.

Westinghouse is the defendant in various civil lawsuits presently pending in the United States District Court for the Western District of Pennsylvania in which issues have been raised which are very similar to those presented in the instant case. The complaints in those suits alleged, *inter alia,* that Westinghouse has discriminated, and is discriminating, on the basis of sex by maintaining sickness and accident plans which exclude pregnancy from their disability income protection coverage, in violation of Title VII of the Civil Rights Act of 1964, as amended[2] (hereinafter "Title VII"). Plaintiffs in those cases, on behalf of a nationwide class, are seeking, *inter alia,* an injunction requiring the elimination of the pregnancy exclusion from Westinghouse's sickness and accident insurance coverage, and monetary damages for many prior years.

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2. 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e, *et seq.*

QUESTION PRESENTED

Whether the exclusion of pregnancy from disability income protection plans violates Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE CASE

Amicus Westinghouse incorporates the Statement of the Case submitted by Petitioner in the Petition For Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

The Petition For Certiorari Should Be Granted Because The Court Below Has Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

A. THE COURT BELOW HAS DECIDED A QUESTION OF FEDERAL STATUTORY INTERPRETATION WHICH HAS NATIONAL IMPLICATIONS.

The question of whether the exclusion of pregnancy from a disability income protection plan violates Title VII of the Civil Rights Act of 1964[3] affects employers, employees, labor organizations and insurance underwriters throughout the United States.

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3. The Act provides in pertinent part as follows: "It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ."

Title VII covers virtually all employers, both private and public throughout the United States.[4] Most of these employers employ women[5] and provide some form of payment to employees for absence from work due to non-occupational sickness or accident.[6] Thousands of union contracts are negotiated each year, almost all of which contain some provision for sickness and accident benefits.[7] Almost every employer in the United States either excludes absence due to pregnancy from sickness and accident benefit coverage or limits such

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4. The Act initially covered "private" employers only, but in 1972 the Act was amended to extend coverage to state and local governments, governmental agencies, political subdivisions and departments and agencies of the District of Columbia as well. *See* Equal Employment Opportunity Act of 1972, 86 Stat. 103. To fall within coverage of Title VII, an employer need only to employ at least 15 persons.

5. In 1973, there were approximately 28 million women employees on nonagricultural payrolls in the United States. Waldman and McEaddy, *Where women work—an analysis by industry and occupation,* MONTHLY LABOR REVIEW, Vol. 97, May 1974, at 3, 6 (table 2).

6. A survey conducted principally by the Employment Standards Administration of the Department of Labor in early 1973 showed that approximately 64% of the nation's workers received "paid sick leave" as part of their overall fringe benefit program. Quinn, *et al., Evaluating working conditions in America,* MONTHLY LABOR REVIEW, Vol. 96, November 1973, at 32, 37.

7. *See e.g.,* U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966). Approximately 93% of workers under collective bargaining agreements were covered by negotiated health and insurance plans in 1972. *Research Summaries,* MONTHLY LABOR REVIEW, Vol. 98, January 1975, at 60, 68 (table 1).

coverage more strictly than coverage for sickness or accident.[8]

Disability benefit programs are designed to protect employees from the loss of income by providing the broadest coverage and maximum benefits available within the limit of a finite fund. The distribution of these benefits is determined by the employer either unilaterally, or through collective bargaining in those situations where a union exists. In creating a benefits program, the employer and/or union seek a balanced package of many benefits which best serve overall employee needs. Since no benefits package can satisfy all wants of all employees, the parties seek to utilize the benefits dollars in the most effective manner, keeping in mind the needs of all the employees.

This Court has recognized that the inclusion of maternity benefits in an insurance plan would greatly increase the overall cost of the Plan. *Geduldig v. Aiello,* 417 U.S. 484, 493-494 (1974). It has been estimated by at least one insurance actuary that the *annual* cost of adding coverage of pregnancy to short and long-term disability income plans currently in effect in the United States would be $1.35 billion.[9]

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8. *See e.g.,* U. S. Department of Labor, Bureau of Labor Statistics, Digest of 100 Selected Health Insurance Plans Under Collective Bargaining, Early 1966, Bull. No. 1502 (September 1966).

9. *Gilbert v. General Electric Company,* 375 F.Supp. 367, 378 (E.D. Va. 1974), *appeal docketed,* No. 74-1557 (4th Cir. 1974). This figure did not allow for the possibility that the existence of the benefit might result in an increase in the frequency of pregnancy.

Although there has been disagreement over such cost estimates, it is inevitable that the increased cost of covering normal pregnancy will result in diminished quality and quantity of other aspects of insurance coverage or other benefits for millions of employees. The dimunition of other types of fringe benefits might also result.

Unless and until this Court determines that pregnancy coverage either need not be provided or must be provided, parties negotiating contracts or setting wage rates, insurance benefits, and other costs of employment will be unsure as to how much, if any, of the total package of economic benefits must be set aside to subsidize pregnancy.

In summary, the question of statutory interpretation decided by the Court below affects almost every employer in the nation, as well as literally millions of employees and the labor organizations which represent them. The question decided by the Court below is of such broad general importance that it should be reviewed by this Court.

B. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW UPON WHICH THE COURTS HAVE DIFFERED.

The importance of the issue presented herein is further illustrated by the number of lawsuits involving this question which are presently pending in lower courts throughout this country.[10]

The United States District Court for the Northern District of Georgia has ruled, contrary to the instant case, that Title VII is not violated by the exclusion of pregnancy from disability income protection plans.[11]

In another recent decision, the United States Court of Appeals for the Second Circuit has reversed a determination by the Southern District of New York that this Court's *Aiello* decision controlled Title VII treatment of the pregnancy exclusion in disability income protection plans.[12] The Second Circuit held that *Aiello* did not preclude a finding that the exclusion of pregnancy from disability income protection plans violated Title VII. However, the Second Circuit expressly avoided discussion of the ultimate question—whether or not the exclusion of pregnancy is, as a matter of law, a violation of Title VII.[13]

10. *E.g., Eberts, et al. v. Westinghouse Electric Corporation,* C.A. No. 74-113 (W.D. Pa.; filed February 5, 1974); *Austerman, et al. v. Westinghouse Electric Corporation,* C.A. No. 75-229 (W.D. Pa.; filed February 21, 1975); *Communications Workers of America v. Illinois Bell,* 73-C-959 (N.D. Ill.; filed April 13, 1973); *Communications Workers of America v. Southern Bell Tel. & Tel.,* No. 18328 (N.D. Ga.; filed May 17, 1973); *Communications Workers of America v. The Pacific Tel. & Tel. Co.,* C.A. No. C-73-1739 RFP (N.D. Cal.; filed September 28, 1973); *Communications Workers of America v. South Central Bell Tel. Co.,* C.A. No. 73-1771 Section A (E.D. La.; filed July 5, 1973); *Grogg v. General Motors Corporation,* No. 73 Civ. 63 (S.D. N.Y.; filed January 4, 1973).

11. *Newmon v. Delta Airlines, Inc.,* 374 F.Supp. 238 (N.D. Ga. 1973).

Every day that passes without a final and definitive decision by this Court gives rise to thousands of new claims and potential lawsuits.

Resolution of the lawsuits which are presently pending is likewise delayed in anticipation of guidance from this Court.

Widespread litigation on this important federal question will continue until the issue is settled by this Court.

II

The Petition For Certiorari Should Be Granted Because The Decision Of The Court Below Is Inconsistent With This Court's Decision in Geduldig v. Aiello And Is Otherwise Erroneous.

The Court of Appeals held, *inter alia,* that Liberty Mutual's income protection plan violates Title VII "by

12. *Communications Workers of America v. American Telephone and Telegraph Company,* No. 74-2191, 2d Cir., March 26, 1975, *reversing* 379 F. Supp. 679 (S.D. N.Y. 1974).

13. The Second Circuit noted that, unlike *Aiello,* the record before it was bare of evidence regarding "the nature, details, operations and effect" of the plan or "the reasons for its enactment." Accordingly, the Second Circuit remanded for development of a record by the trial court.

excluding pregnancy benefits from coverage while including other kinds of temporary disabilities."[14] The Court below explained that although Liberty Mutual's plan is neutral on its face, it "treats a protected class of persons in a disparate manner."[15]

The decision of the Court of Appeals is inconsistent with the decision of this Court in *Geduldig v. Aiello,* 417 U.S. 484 (1974).

The *Aiello* case involved a challenge to the constitutionality of the disability insurance system of the State of California under which benefits were paid to persons in private employment who were temporarily unable to work because of disability not covered by workmen's compensation. The California plan excluded from coverage disabilities that were attributable to pregnancy. The District Court held that the exclusion of such disabilities violated the Equal Protection Clause of the Fourteenth Amendment.

This Court reversed, holding that the "pregnancy exclusion" did not constitute sex discrimination in violation of the Equal Protection Clause. This Court stated that:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and

14. *Wetzel and Ross v. Liberty Mutual Insurance Company,* ..... F. 2d ....., No. 74-1233, 3d Cir., February 11, 1975, Appendix to Petition for Writ of Certiorari at A14.

15. *Id.*

> women are not. Likewise, there is no risk from which women are protected and men are not."
>
> [Footnote 20 is that of the Court.][16]

In footnote twenty to the *Aiello* opinion this Court explained its holding that the exclusion was not sex discrimination:

> "The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."[17]

In the instant case, the Third Circuit dismissed the applicability of *Aiello* on the grounds that *Aiello* was a case of constitutional analysis wherein deference was shown to the legislative judgment of the State of California in balancing public social welfare interests with the Constitution.

It is true that a portion of the *Aiello* decision was devoted to a consideration of the significant economic costs that justified the decision of the California legislature to exclude certain disabilities related to pregnancy. However, the Third Circuit failed to recognize that the conclusion of this Court that the California plan did not involve sex discrimination was central to the Court's conclusion that the Equal Protection Clause was not violated.

The Third Circuit held that the exclusion of maternity benefits from the Liberty Mutual income protection plan violates the Act because the plan treats a protected class of persons in a disparate manner. This

16. *Aiello, supra,* 417 U.S. at 496-497.

17. *Aiello, supra,* 417 U.S. at 497.

holding could have been reached only if (a) the Court below failed to accept the *Aiello* classifications quoted above or (b) the Court below, while accepting the *Aiello* classifications, nevertheless determined that a class of "pregnant women" may not be treated differentially under the Act than "non-pregnant persons."

Both lines of reasoning are erroneous.

First, the Third Circuit erred if it failed to apply the *Aiello* classifications. This Court's determinations in *Aiello* of the relevant classifications resulting from exclusion of pregnancy and whether or not those classifications discriminate on the basis of sex are, in themselves, legal principles which are not dependent upon any economic analysis or legislative deference. These *Aiello* principles are therefore applicable to statutory interpretation as well as constitutional analysis.

Second, assuming the Third Circuit accepted the *Aiello* classifications, it erroneously concluded that a class of pregnant women is "protected" under the Act and therefore may not be treated differently from other employees. Title VII prohibits discrimination on the basis of *sex*. This Court explicitly held, in *Aiello,* that "pregnant women" and "non-pregnant persons" are not sex-based classifications.[18]

Our interpretation of this Court's decision in *Aiello* is consistent with prior decisions of this Court.

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18. *Aiello, supra,* 417 U.S. at 496, n. 20 ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .").

In *Frontiero v. Richardson*[19] and *Reed v. Reed*[20] this Court did not deal with the question of "pregnant persons." Those cases both involved discrimination based upon gender, as such, and were expressly distinguished on this basis by this Court in *Aiello.*

Similarly, in *Phillips v. Martin Marietta Corp.,*[21] the alleged discrimination was based solely on sex in that females with pre-school age children were subject to different hiring policies than men with pre-school children. Unlike pregnancy, the condition on which the alleged discriminatory action was based in *Martin Marietta, i.e.,* having pre-school children, was a condition which can and does occur among both males and females.

This Court's decision in *Cleveland Board of Education v. LaFleur,*[22] which involved a mandatory leave policy for pregnant teachers, is also clearly reconcilable with *Aiello.* First, this Court in *LaFleur* did not hold that the maternity leave regulations were sexually discriminatory within the meaning of the Equal Protection Clause of the 14th Amendment. Rather, this Court held that the Due Process Clause of the 14th Amendment prohibited the state government, through the school system, from depriving a teacher of her job upon the basis of arbitrary unwarranted presumptions as to how long a pregnant person can work. Second, the restrictive maternity leave policies in *LaFleur* involved no legitimate cost variables to the employer to justify the with-

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19. 411 U.S. 677 (1973).
20. 404 U.S. 71 (1971).
21. 400 U.S. 542 (1971).
22. 414 U.S. 632 (1974).

holding or termination of a job, whereas the conveyance of disability benefits is extremely costly.[23]

Our view of the proper interpretation of this Court's decision in *Aiello* is supported by the legislative history of the proposed Equal Rights Amendment to the United States Constitution ("ERA")[24] which indicates that Congress has disavowed the position that an employment policy or practice constitutes sex discrimination merely because it is based upon a sex-related physical characteristic.

For example, the most vigorous supporters of the Equal Rights Amendment agreed that the ERA would not prohibit reasonable classifications based on physical characteristics that are unique to one sex.[25] So long as a characteristic is found in all women and no men, or all men and no women, a law or covered employment practice predicated upon such characteristics would not violate the ERA for it would raise no problem of ignoring individual characteristics in favor of prevailing

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23. *See Brief, supra* at 6.

24. The ERA requires that:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

The House approved the ERA by a vote of 354-23. H. J. Res. 208, 92d Cong., 1st Sess., 117 Cong. Rec. H 9392 (daily ed. Oct. 12, 1971). The Senate approved it by a vote of 84-8. S. J. Res. 122, 92d Cong., 2d Sess., 118 Cong. Rec. S 4612 (daily ed. March 22, 1972). The Amendment has now been submitted to the states for ratification.

25. *See e.g.,* Hearings Before Subcomm. 4 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 40 (1971) (hereinafter cited as ERA House Hearings) (testimony of Congresswoman Martha Griffiths); *Id.* at

(footnote continued on following page)

group characteristics or an average. Under this principle, supporters of the ERA repeatedly cited maternity legislation and laws governing childbearing and pregnancy as typical of "state action" which would not be affected by the ERA.[26]

In view of the failure of the ERA to treat a matter such as that involved in this case as sexually discriminatory, it would be anomalous in the extreme to regard it as sex discrimination under Title VII. The legislative history of the ERA in this respect should be viewed as the controlling substitute for the comparatively barren legislative history of Title VII on sex discrimination.

In summary, the Court of Appeals misconstrued this Court's opinion in *Aiello* and erroneously concluded that the employment practice herein constitutes sex discrimination as proscribed by Title VII.

It is important to keep in mind that the grant or denial of income protection for pregnancy does *not* involve an equalization of employment opportunities for women. Women have attained equal employment opportunities when they are permitted to take a leave of absence during pregnancy and the immediate post-delivery period.

(footnote continued from preceding page)

116 (testimony of Congresswoman Bella Abzug); 117 Cong. Rec. H 9368 (daily ed. Oct. 12, 1971) (remarks of Congressman Ryan).

26. *See e.g.,* ERA House Hearings at 402 (testimony of Professor Thomas I. Emerson, Lines Professor of Law at The Yale Law School); Hearings on S. J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm., 91st Cong., 2d Sess. 493 (1970) (testimony of Betty Friedan, founder of the National Organization for Women).

Instead, the issue here is whether employers will be required to subsidize the cost to a family of the bearing of children. We submit that it would be a gross distortion of Title VII to impose the cost of child bearing upon all employers and employees through the guise of eliminating sex discrimination.

CONCLUSION

For the reasons set forth above, this Court should grant Liberty Mutual's Petition for a Writ of Certiorari to review the Third Circuit's decision. The issues presented by the instant case are of general importance to the nation and must be finally resolved by this Court.

Respectfully submitted,

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